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FROM *EVERSON* TO *ZELMAN*: THE ADVENT OF "TRUE PRIVATE CHOICE" AND THE EROSION OF THE WALL BETWEEN CHURCH AND STATE

Melinda Barker*

I. INTRODUCTION

The First Amendment of the Constitution provides for freedom of religion in our country.¹ This includes not only the freedom to exercise our chosen religion, but also the freedom to refrain from participating in a particular religion or any religion at all.² Historically, the United States Supreme Court has interpreted the First Amendment to preclude the government from disbursing taxpayer funds for the advancement or indoctrination of religion.³ The majority decision in *Zelman v. Simmons-Harris*⁴ marked a significant turn from these principles, in that the Court upheld a state program that provided unrestricted funds to private religious schools, who were free to use those funds in furtherance of their stated missions to indoctrinate students in their religion.⁵

This comment will argue that school voucher programs, as approved in *Zelman*, fall outside the permissible bounda-

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1. The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

2. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting U.S. CONST. amend. I).

3. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 16.

4. 536 U.S. 639, 643-63 (2002).

5. *Id.* at 664-67.

ries of the Establishment Clause. The comment will begin with a discussion of the historical background of the Establishment Clause.⁶ It will then summarize the analysis applied by the Supreme Court to evaluate private school assistance programs,⁷ beginning with *Everson*⁸ in 1947 and ending with *Zelman*⁹ in 2002.¹⁰ It will then analyze the *Zelman* decision, noting the Supreme Court's errors in interpretation of prior decisions and its misapplication of previously identified factors in the evaluation of a private school assistance program challenge.¹¹ Finally, this comment will suggest a method for evaluating private school assistance programs that respects the principles behind the line of prior Supreme Court decisions, which preserved the separation of church and state.¹²

II. BACKGROUND

A. *The Founding Fathers*

To understand the Establishment Clause, one must understand the intentions of the founding fathers and the concerns of the citizens at the time of its ratification. Many of the earliest settlers in America were fleeing from European governments that compelled their citizens to support and attend the churches favored by the government.¹³ However, the aversion of the early settlers to compelled indoctrination in a government-chosen religion did not prevent state governments such as Virginia from taxing citizens for the benefit of

6. See *infra* Part II.A.

7. The term "private school assistance programs" will be used throughout this comment to encompass the variety of government-funded programs that have been discussed by the Court over the years. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997) (federally funded remedial instruction); *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. (1986) (disability rehabilitation services); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (tax deductions and tax credits). The programs have taken many forms, including tax deductions and credits and various forms of direct and indirect subsidies. This term will be utilized to refer to all the programs resulting in government aid to private, and therefore religious, schools as a whole.

8. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

9. 536 U.S. 639.

10. See *infra* Part II.B-D.

11. See *infra* Parts II.E-III.C.

12. See *infra* Part IV.

13. See *Everson*, 330 U.S. at 9-10.

selected churches.¹⁴ Thomas Jefferson and James Madison led the movement to prevent government interference in religious freedom by fighting against the renewal of the state tax levied by Virginia in support of the Christian Church.¹⁵ This movement stood for the popular belief that a government should not force free men to support any church, and that society benefits when the minds of men are free from religious oppression.¹⁶

After successful lobbying by Jefferson and Madison,¹⁷ the Virginia legislature passed the Virginia Bill for Religious Liberty, originally written by Thomas Jefferson, which provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."¹⁸ The Supreme Court has recognized that the Establishment Clause was intended to provide the same protections against intrusion by the government in religious liberty as the Virginia Bill, because the same men drafted and promoted both.¹⁹ As recently as 2000, the Supreme Court has described the purpose of the Establishment Clause: "to prohibit not only the institution of an official church, but any government act favoring religion, a particular religion, or for that matter irreligion."²⁰

14. *See id.* at 9-11.

15. *See id.* at 11-13.

16. *See id.*

17. Madison penned his famous letter "Memorial and Remonstrance" while lobbying against the Virginia church tax law. *See* JAMES MADISON, WRITINGS 29-36 (Jack N. Rakove, compiler, Literary Classics of the United States Inc., 1999). In *Everson*, Justice Black paraphrased the letter as follows:

[Madison] argued that true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

330 U.S. at 12.

18. *Everson*, 330 U.S. at 13 (quoting 12 Hening, Statutes of Virginia 84 (1823)).

19. *See id.*

20. *Mitchell v. Helms*, 530 U.S. 793, 868 (2000) (Souter, J., dissenting). The majority in *Mitchell* upheld a federal funding program disbursing funds to states to provide instructional supplies and materials to both public and private schools. *Id.* at 835-36.

B. 1947-1971: Strict Separation Between Church and State

The first significant case in which the Supreme Court addressed a private school assistance program was *Everson v. Board of Education*.²¹ In this case, the Court held constitutional a program that provided direct reimbursement to parents of secondary and primary school children for the costs incurred in busing their children to school.²² The program was available for all school children in the state, whether enrolled in a public or private school.²³ Because the program applied to all children, the Court held that the program did not violate the Establishment Clause.²⁴ The five Justice majority in *Everson* reasoned that the busing program resembled a general public benefit, such as police and fire protection, more than a program designed to provide government support for religious schools and religious indoctrination.²⁵

The majority carefully pointed out that despite its holding that this particular program did not violate the Establishment Clause, the Court did not intend in any way to weaken the strong protections of the Establishment Clause.²⁶ The Court further stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."²⁷ In utilizing the words "wall between church and state" that have been credited to Thomas Jefferson,²⁸ Justice Black reinforced that the Court was mindful of the ideals of the founding fathers and would stay true to them.²⁹ The four dissenting Justices in *Everson*, however, found that this program violated the Establishment Clause and the founding fathers' intentions.³⁰ They emphasized that spending any tax dollars in support of religious indoctrination unconstitution-

21. *Everson*, 330 U.S. at 14.

22. *Id.* at 17.

23. *Id.*

24. *Id.*

25. *Id.* at 17-18.

26. *Id.* at 18.

27. *Everson*, 330 U.S. at 18.

28. The first known use of the phrase "a wall between church and state" has been traced to Thomas Jefferson in a personal letter written just after the passage of the First Amendment. See Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 450-51 (2002).

29. *Everson*, 330 U.S. at 11-16.

30. *Id.* at 46-47 (Rutledge, J., dissenting).

ally coerced taxpayers to subsidize religious beliefs that they may not wish to support.³¹ The dissenting Justices concluded with a warning that even small steps towards allowing the government to breach the separation of church and state could ultimately result in the erosion of our Establishment Clause rights.³²

Between 1948 and 1968, the Court decided several private school assistance cases.³³ According to the majority in *Board of Education of Central School District No. 1 v. Allen*,³⁴ these decisions reinforce the notion that the Constitution prohibits any program that breaches the separation of church and state.³⁵ Addressing the question of what constitutes a breach of the separation of church and state, the Court declared: "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."³⁶

In *Allen*, the Court applied this constitutional standard to a New York statute that required local public school districts to loan secular textbooks to all students, public or private, in grades seven through twelve within their boundaries.³⁷ With a six-vote majority, the Court held that the New York program did not violate the Establishment Clause.³⁸ The majority cited several characteristics of the program that influenced its decision: the program was generally available to all school children;³⁹ the state owned the books, not the schools or the children;⁴⁰ no funds or books were furnished directly to the schools;⁴¹ and only secular books were loaned under the program.⁴² Based on these factors, the Court found that the program did not coerce children to participate in religion and therefore did not advance or inhibit religion.⁴³ The

31. *Id.* at 21-22 (Jackson, J., dissenting).

32. *Id.* at 57 (Rutledge, J., dissenting).

33. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952).

34. 392 U.S. 236 (1968).

35. *Id.* at 242-43.

36. *Id.* at 243 (quoting *Abington*, 374 U.S. at 222).

37. *Id.* at 238.

38. *Id.* at 248-49.

39. *Id.* at 243.

40. *Allen*, 392 U.S. at 243.

41. *Id.* at 243-44.

42. *Id.* at 244-45.

43. *Id.* at 243.

three dissenting Justices in *Allen* found that providing textbooks for use in sectarian schools clearly violated the separation of church and state.⁴⁴ Justice Black, who wrote the majority opinion in *Everson*, argued that providing textbooks to a religious school "realistically will in some way inevitably tend to propagate the religious views of the favored sect."⁴⁵ He contrasted this with the program in *Everson* that "merely provid[ed] a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs."⁴⁶

C. 1971-1983: The New Test on the Block: Lemon v. Kurtzman

In 1971, the Supreme Court heard *Lemon v. Kurtzman*,⁴⁷ which challenged two state statutes providing aid to nonpublic elementary and secondary schools.⁴⁸ The first program provided reimbursement to the schools for expenses such as textbooks, teachers' salaries, and instructional materials.⁴⁹ The second program paid a fifteen percent salary supplement for teachers.⁵⁰ The Court set forth a new three-prong test, building upon the *Allen* standard for determining the constitutionality of private school assistance programs.⁵¹ Taken directly from *Allen*, the first two prongs required a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion.⁵² The third prong, gleaned from discussions in several preceding cases, including *Allen*,⁵³ provided that the statute must not foster excessive entanglement between government and religion.⁵⁴ A private school assistance program must satisfy all three prongs of this test to be upheld by the Court.⁵⁵ In *Lemon*, the Court held that the

44. *Id.* at 251 (Black, J., dissenting).

45. *Id.* at 252 (Black, J., dissenting).

46. *Allen*, 392 U.S. at 253 (Black, J., dissenting).

47. 403 U.S. 602 (1971).

48. *Id.* at 606-07.

49. *Id.* at 609-10.

50. *Id.* at 607.

51. *Id.* at 612-13.

52. *Id.* at 612.

53. *See* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. *Allen*, 392 U.S. 236, 248 (1968); *see also* *Walz v. Tax Commission*, 379 U.S. 664 (1970) (upholding a property tax exemption for qualified religious organizations).

54. *See Lemon*, 403 U.S. at 613.

55. *Id.* at 612-13.

reimbursement program violated the third prong of the test, in that it would require excessive oversight to ensure the funds were applied only to secular subjects.⁵⁶ The salary supplement program violated both the second and third prongs of the test, because it provided aid directly to church-related schools and caused excessive entanglement.⁵⁷ In its decision, the Court noted that the purpose of the *Lemon* test was not to “engage in a legalistic minuet in which precise rules and forms must govern.”⁵⁸ Although the Court had finally declared a clear statement of the issues relevant to Establishment Clause challenges,⁵⁹ the Court did not state whether the test would clarify the status of the law or simply would provide a new framework for continuing debate.⁶⁰

In 1973, the Court had its first opportunity to apply the *Lemon* test in *Committee for Public Education and Religious Liberty v. Nyquist*.⁶¹ In *Nyquist*, the majority declared unconstitutional two state programs that provided tuition tax credits and tuition reimbursement to the parents of private school children.⁶² The Court cited several factors leading to its decision that the programs impermissibly advanced religion in violation of the second prong of the *Lemon* test.⁶³ First, the programs were available only to the parents of private school students, effectively providing financial support for private religious schools.⁶⁴ Second, because the permissible uses of the aid were unrestricted, the state could not ensure the schools used the funds only for secular purposes.⁶⁵ Third, the program created an incentive to send children to religious schools in violation of the principal of government neutrality towards religion.⁶⁶ The Court also discussed whether disburse-

56. *Id.* at 619-20.

57. *Id.* at 620-21.

58. *Id.* at 614.

59. The *Lemon* test is still the test most often utilized in other types of Establishment Clause challenges. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 986-87 (Richard S. Epstein et al. eds., 1997).

60. See Maureen O. Manion, *Churches and States: The Politics of Accommodation*, 44 J. OF CHURCH & ST. 317, 319 (2002).

61. 413 U.S. 756 (1973).

62. See Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 57-58 (1993).

63. *Id.* at 59-60.

64. *Nyquist*, 413 U.S. at 783.

65. *Id.* at 780.

66. *Id.* at 786.

ing the aid to the parents, instead of directly to the schools, cured the Establishment Clause implications of the programs.⁶⁷ In declaring that funneling money via a third party, the parents, did not cure the constitutional defects of the program, the Court explained that

[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.⁶⁸

After *Nyquist*, the Court heard *Meek v. Pittenger*,⁶⁹ which challenged three Pennsylvania private school assistance programs.⁷⁰ The first program permitted state officials to loan instructional materials and equipment to all qualified private schools within the state.⁷¹ The Court found this program impermissible on the grounds that the total subsidization to private schools would cost approximately twelve million dollars, which "inescapably results in the direct and substantial advancement of religious activity."⁷² The second program made available professional staff and equipment for auxiliary services⁷³ for all private schools; however, it only provided aid upon the request of the private schools' administrations.⁷⁴ According to the Court, this program did not meet the third prong of the *Lemon* test, because it would require too much oversight to ensure that the schools used these services exclusively for secular purposes, and thus would create excessive entanglement between government and religion.⁷⁵ In contrast to the first two programs in *Meek*, the third program, which provided secular textbooks to all primary and secondary school children,⁷⁶ did not violate the Establishment Clause.⁷⁷

67. *Id.*

68. *Id.*

69. 421 U.S. 349 (1975).

70. *Id.* at 351-55.

71. *Id.* at 354-55.

72. *Id.* at 365-66.

73. The auxiliary services provided by the programs include remedial and accelerated instruction, guidance, counseling, testing, and speech and hearing therapy services. *Id.* at 352-53.

74. *Id.* at 367.

75. *Meek*, 421 U.S. at 370-73.

76. *Id.* at 354-55.

77. *See id.* at 349. Justice Stevens announced the judgment of the Court

D. 1983-2001: The Advent of "True Private Choice"

Eight years after the decision in *Meek*, the Supreme Court heard *Mueller v. Allen*.⁷⁸ *Mueller* involved a private school assistance program in Minnesota that provided state income tax deductions for school expenses, such as tuition, books, and transportation, incurred by parents of public and private school children.⁷⁹ The Court determined that the program satisfied all three prongs of the *Lemon* test⁸⁰ and was therefore constitutional.⁸¹ Though the program in *Mueller* was similar to the program struck down in *Nyquist*,⁸² the Court distinguished the *Mueller* program because of its availability to parents of both public and private school children.⁸³ Based on this factor, the Court found the program to be more in line with the permissible programs in *Everson* and *Allen* than those in *Nyquist*.⁸⁴

The *Mueller* Court emphasized two factors that had been mentioned in previous cases, but had never before been the determinative factors for upholding private school assistance programs. First, the Court looked at whether the program was designed to provide aid to all school children without any reference to religion.⁸⁵ The Court rejected the argument that the programs inevitably advanced religion due to the substantial amount of aid that ultimately ended up in parochial schools.⁸⁶ Second, the Court found that by structuring the

and delivered his opinion, which was the opinion of the Court on all of the issues except his finding that the textbook program was unconstitutional. Six Justices, in a mix of concurring and dissenting opinions, found that the textbooks portion of the program was constitutional. *See id.*

78. 463 U.S. 388 (1983).

79. *See id.* at 390-91.

80. *See id.* at 394-403. In finding that this program met the *Lemon* test, the Court made the following determinations: the legislature enacted the program with the secular purpose of defraying the costs of educational expenses for all parents; *id.* at 396, the program did not have the primary effect of advancing sectarian education as the program was available to all parents, whether their children attended public or private school; *id.* at 395-402, and the program did not excessively entangle the state in religion, as no further action or decision-making was required of state officials once they determined whether a textbook qualified for a tax deduction, *id.* at 403.

81. *Id.* at 391, 404.

82. *See Green, supra* note 62, at 60-61.

83. *Mueller*, 463 U.S. at 398.

84. *Id.* at 393-94.

85. *Id.* at 397-98.

86. *Id.* at 400-01.

program so that the parents receive the aid, such as via tax deductions, the state had "reduced the Establishment Clause objections"⁸⁷ to the program. The Court affirmed the reasoning from *Nyquist* that "the fact that aid is disbursed to parents rather than to . . . schools' is a material consideration in Establishment Clause analysis, albeit 'only one among many factors to be considered.'"⁸⁸ However, the Court further stated that when the aid ends up at parochial schools based on independent choices of the parents, "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally."⁸⁹

Written by Justice Marshall, the dissent strongly disagreed with the majority's assertion that the programs in *Nyquist* were distinguishable from the program in *Mueller*.⁹⁰ In Marshall's view, *Nyquist* had established that "a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students"⁹¹ and the Court had chosen to break completely with long-standing Establishment Clause jurisprudence going back to *Everson*.⁹²

Two years after *Mueller*, the Court heard two new private school assistance cases, *Grand Rapids v. Ball*⁹³ and *Aguilar v. Felton*.⁹⁴ These cases challenged private school assistance programs that placed publicly funded teachers in private schools to teach secular classes.⁹⁵ The majorities in both cases invalidated the programs, stating that neither

87. *Id.* at 399.

88. *Id.* (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 781 (1973)).

89. *Mueller*, 463 U.S. at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

90. *See id.* at 408-09 (Marshall, J., dissenting).

91. *Id.* at 404 (Marshall, J., dissenting).

92. The dissent stated:

For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.

Id. at 416-17 (Marshall, J., dissenting).

93. 473 U.S. 373 (1985).

94. 473 U.S. 402 (1985).

95. *See id.* at 406; *Ball*, 473 U.S. at 375.

program met all of the *Lemon* requirements.⁹⁶ The two programs in *Ball*⁹⁷ impermissibly advanced religion because allowing public teachers on parochial school grounds would suggest to the school children that the government endorsed the religion affiliated with the school.⁹⁸ The program in *Aguilar* created excessive entanglement due to the significant government oversight necessary to ensure that the public employees did not inculcate religion.⁹⁹ Thus, at this point, state programs providing publicly funded teachers to teach on parochial school grounds were not permissible under the Establishment Clause.¹⁰⁰

The following year, the Court heard *Witters v. Washington Department of Services for the Blind*.¹⁰¹ In *Witters*, program administrators denied assistance to a blind student, who qualified for vocational assistance from the state,¹⁰² because he attended a religious school and the program administrators believed that assisting him would violate the Establishment Clause.¹⁰³ Nonetheless, the Court found the program permissible under the *Lemon* test.¹⁰⁴ Justice Marshall took care, however, to clarify that he was not reinforcing the rationale of the majority in *Mueller*.¹⁰⁵ Instead of citing to *Mueller*, he reinforced the main principle in *Ball* that

[T]he State may not grant aid to a religious school,

96. See *Aguilar*, 473 U.S. at 414; *Ball*, 473 U.S. at 397. The program in *Aguilar* met the first two prongs of the *Lemon* test, but impermissibly created excessive entanglement between church and state, because "assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." *Aguilar*, 473 U.S. at 412. The program in *Ball* failed the second prong of the *Lemon* test, as the Court found that employing sectarian teachers to teach secular subjects ran a "substantial risk of state-sponsored indoctrination." *Ball*, 473 U.S. at 387.

97. Titled the "Community Education" program, the first program in *Ball* provided part-time instructors. *Ball*, 473 U.S. at 377. The second program, titled the "Shared Time" program, provided full-time instructors. *Id.* at 376.

98. See *id.* at 389-93.

99. See *Aguilar*, 473 U.S. at 409-14.

100. See Maureen E. Cusack, *The Constitutionality of School Voucher Programs: The United States Supreme Court's Chance to Revive or Revise Establishment Clause Jurisprudence*, 33 COLUM. J.L. & SOC. PROBS. 85, 92-93 (1999).

101. 474 U.S. 481 (1986).

102. WASH. REV. CODE § 74.16.181 (1981) (authorizing assistance, in the form of special education and/or training, to assist visually handicapped persons in attaining a level of self-sufficiency) (repealed 1983).

103. *Witters*, 474 U.S. at 483-84.

104. *Id.* at 485.

105. See Green, *supra* note 62, at 64.

whether cash or in-kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State. Aid may have that effect even though it takes the form of aid to students or parents.¹⁰⁶

The dissenting Justices argued that *Mueller*, not *Ball*, was the controlling authority for this case.¹⁰⁷ Justice Powell, in particular, argued that a facially neutral program, equally available to public and private school students, resulted in government assistance to parochial schools only through the choices of the parents, and thus the advancement of religion was attributable to the parents, not the state.¹⁰⁸

In 1993, the Supreme Court heard *Zobrest v. Catalina Foothills School District*.¹⁰⁹ In *Zobrest*, the parents of a deaf child who qualified for disability benefits under the Individuals with Disabilities Act¹¹⁰ sued after he was denied participation in a program that would provide him with a sign-language interpreter at school.¹¹¹ The district denied his request on the grounds that providing a public interpreter for a child attending a parochial school would violate the Establishment Clause.¹¹² In a 5-4 decision¹¹³ the majority upheld the constitutionality of the program,¹¹⁴ interpreting *Mueller* and *Witters* to hold that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."¹¹⁵ In his dissent, Justice Blackmun questioned the majority's interpretation of the precedent set by *Mueller* and *Witters*, stating, "the Court never has authorized a public employee to

106. *Witters*, 474 U.S. at 487 (quoting *Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985)).

107. See Green, *supra* note 62, at 64-65.

108. See *Witters*, 474 U.S. at 490-91 (Powell, J., concurring).

109. 509 U.S. 1 (1993).

110. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87 (1970) (amended 1991).

111. *Zobrest*, 509 U.S. at 4.

112. *Id.*

113. Four of the Justices dissented on the basis that the case should have been remanded for consideration on other non-constitutional grounds. *Id.* at 14 (Blackmun, J., dissenting).

114. *Id.* at 6 (Blackmun, J., dissenting).

115. *Id.* at 8.

participate directly in religious indoctrination.”¹¹⁶ In Justice Blackmun’s view, the interpreter would be participating in religious indoctrination by interpreting the content of both religious and secular classes of the deaf student.¹¹⁷ After the decision in *Zobrest*, which raised new questions regarding the constitutionality of public employees in private schools,¹¹⁸ the Court granted certiorari to *Agostini v. Felton*.¹¹⁹ The petitioners in *Agostini* argued that due to changes in the law following *Aguilar v. Felton*,¹²⁰ the decision in *Aguilar* should be overruled.¹²¹ The petitioners also claimed entitlement to relief from the injunction put in place by the *Aguilar* decision.¹²² The 5-4 majority in *Agostini* acknowledged that “our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar*.”¹²³ The majority concluded that *Witters* and *Zobrest* had parted from the assumption, inherent in *Aguilar* and *Ball*, that placing public employees on parochial school grounds would inculcate religion or act as government endorsement of religion affiliated with the school.¹²⁴

The *Agostini* Court also reworked the standards for evaluating private school assistance programs, slightly modifying the *Lemon* test.¹²⁵ The Court eliminated the third prong as a separate factor for consideration and recast it as one of three factors to consider in determining whether the program had the effect of advancing religion.¹²⁶ Thus, if a program had a legitimate state purpose, as all programs designed to raise the quality of secondary and primary education do,¹²⁷ the Court then evaluated whether it would 1) result in government indoctrination, 2) define its recipients by reference to religion, or 3) create an excessive entanglement between church

116. *Id.* at 18 (Blackmun, J., dissenting).

117. *Zobrest*, 509 U.S. at 19 (Blackmun, J., dissenting).

118. See Davidson, *supra* note 28, at 462.

119. 521 U.S. 203 (1997).

120. See *supra* text accompanying notes 93-100.

121. See *Agostini*, 521 U.S. at 209.

122. *Id.* at 208-09.

123. *Id.* at 236.

124. *Id.* at 227.

125. See Cusack, *supra* note 100, at 93; Davidson, *supra* note 28, at 462-63.

126. See Cusack, *supra* note 100, at 94.

127. See William G. Frey & Virginia Lynn Hogben, *Vouchers, Tuition Tax Credits, and Scholarship Donation Tax Credits: A Constitutional and Practical Analysis*, 31 STETSON L. REV. 165, 168 (2002).

and state.¹²⁸ The dissenting Justices argued that the result of the *Agostini* majority's misinterpretation of *Witters* and *Zobrest* "is to repudiate the very reasonable line drawn in *Aguiar* and *Ball*, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government."¹²⁹ With the *Agostini* decision, a narrow majority¹³⁰ of the Court confirmed that long-standing Establishment Clause principles were no longer controlling and set the stage for even further erosions of the wall between church and state.¹³¹

In 2000, the Supreme Court decided *Mitchell v. Helms*,¹³² which challenged a federal program that provided federal funding to state agencies for distribution to state programs designed to assist children in elementary and secondary schools.¹³³ Presumably to comply with Establishment Clause prohibitions, the program placed several restrictions on the use of the funds, but the state agencies provided funding to both public and private schools within their states.¹³⁴ In a 6-3 decision, the Court approved the program, but was not able to achieve a majority opinion.¹³⁵ The plurality expressly rejected the two main arguments made against the programs: that 1) direct non-incidental aid to religion is always unconstitutional,¹³⁶ and 2) a provision of aid to religious schools without restricting its use to sectarian purposes (thus permitting diversion of the funds to religious indoctrination) is always impermissible.¹³⁷ Justice Scalia explained that, rather than deciding on the basis of direct versus indirect aid,¹³⁸ the Court

128. See *Agostini*, 521 U.S. at 234.

129. *Id.* at 240-41 (Souter, J., dissenting).

130. The majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. The dissenting Justices were Justices Stevens, Souter, Ginsburg, and Breyer. See *id.* at 203.

131. See Davidson, *supra* note 28, at 463-65.

132. 530 U.S. 793 (2000).

133. *Id.* at 801-03.

134. *Id.* at 802-03.

135. Six Justices took part in the judgment of the Court. No opinion, however, achieved a majority. Justice Thomas wrote the plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice O'Connor, who was joined by Justice Breyer, wrote a concurring opinion. Justices Souter dissented, joined by Justices Stevens and Ginsburg. See *id.* at 793.

136. *Id.* at 814-20.

137. *Id.* at 820-25.

138. *Mitchell*, 530 U.S. at 815-16.

has consistently evaluated the neutrality of the program to determine whether the government is impermissibly indoctrinating religion at the recipient schools.¹³⁹ In the plurality's view, neutrality exists when a program is available to a broad class of recipients without any reference to religion.¹⁴⁰ Another means of assuring neutrality is to provide funds to the parents of school children who "only as a result of the genuinely independent and private choices of individuals"¹⁴¹ would then transfer the funds to their school of choice.¹⁴² Any indoctrination that would occur from the government funds is thus removed from the government and attributed to the parents.¹⁴³

In her concurrence, Justice O'Connor agreed with the holding of the plurality that upheld the constitutionality of the private school assistance program in *Mitchell*.¹⁴⁴ Writing a separate opinion, she expressed her concern that the breadth of the statements made by the plurality was improper.¹⁴⁵ She agreed with the dissent that, in effect, the plurality had found that evenhanded neutrality was the sole relevant factor to constitutionality under the Establishment Clause.¹⁴⁶ Justice O'Connor disagreed that that neutrality should be the sole concern, and with the plurality's statement that divertability of aid was not of constitutional concern to an evenhanded public aid program.¹⁴⁷ In her opinion, the plurality misconstrued the precedent set by *Witters* and *Zobrest* to permit actual diversion of funds.¹⁴⁸ According to Justice O'Connor, those programs were upheld on a finding that the programs offered true private choice to the recipients, not the permissibility of diversion of government funds.¹⁴⁹ She argued that an analysis of diversion of funds should be based on *Allen*, which required proof of actual diversion of funds to invalidate an otherwise permissible program.¹⁵⁰ If diversion ex-

139. *Id.* at 809.

140. *Id.*

141. *Id.* at 810 (citing *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

142. *Id.* at 810.

143. *Id.*

144. *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring).

145. *Id.* (O'Connor, J., concurring).

146. *Id.* at 838 (O'Connor, J., concurring).

147. *Id.* at 840 (O'Connor, J., concurring).

148. *Id.* at 841 (O'Connor, J., concurring).

149. *Id.* (O'Connor, J., concurring).

150. *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring).

isted, the Court would strike down the program as unconstitutional due to lack of precedent for "the use of public funds to finance religious activities."¹⁵¹ After her evaluation of the *Mitchell* program however, Justice O'Connor found that any diversion of funds in this program was de minimis, and thus she concurred with the holding of the plurality.¹⁵²

Justice O'Connor also emphasized the potential role of private choice in the evaluation of private school assistance programs.¹⁵³ She stated that when a government program gives aid to a student who is free to choose whether to apply that aid to a religious or non-religious institution, the advancement of religion that may occur is "wholly dependent on the student's private decision" and therefore permissible.¹⁵⁴ Thus, a neutral program that causes diversion of funds for religious purposes would not be acceptable, but a program that allows for aid to religious schools only after the exercise of an independent choice by the student would be permissible.

In his dissent, Justice Souter argued that "[s]o far the line drawn has addressed government aid to education There may be no aid supporting a sectarian school's religious exercise or the discharge of its religious mission."¹⁵⁵ He found several problems with the program, primarily evidence in the record that its funds were being diverted to religious purposes.¹⁵⁶ Justice Souter stated that the plurality had "espouse[d] a new conception of neutrality"¹⁵⁷ that would act as its own test of constitutionality and would "eliminate enquiry

151. *Id.* at 840 (O'Connor, J., concurring) (quoting *Rosenberger v. Rector*, 515 U.S. 819, 847 (1995)).

152. *Id.* at 849 (O'Connor, J., concurring).

153. *Id.* at 841-44 (O'Connor, J., concurring).

154. *Id.* at 842 (O'Connor, J., concurring).

155. *Id.* at 868 (Souter, J., dissenting).

156. See Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, 2001 BYU EDUC. & L.J. 271, 281 (2001).

157. *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting). Justice Souter described the historical treatment of neutrality by the Court in Establishment Clause jurisprudence, breaking it down into three distinct eras. First, in *Everson* and *Allen* "neutrality" meant "an adequate state of balance between government as ally and as adversary to religion." *Id.* at 879 (Souter, J., dissenting). Next, "neutrality" was used as a term to describe benefits determined to be non-religious, regardless of the role of the government in supplying the benefits. *Id.* at 879-81 (Souter, J., dissenting). Finally, starting in the 1980s "neutrality" meant evenhanded, or applicable to both secular and religious recipients. *Id.* at 881-83 (Souter, J., dissenting).

into a law's effects."¹⁵⁸ In conclusion, Justice Souter warned that if the reasoning of the plurality in *Mitchell* gained a majority in the Court, the "substantive principle of no aid to religious mission[s]"¹⁵⁹ from *Everson* and *Allen* would be destroyed.

E. 2001: Zelman v. Simmons-Harris & Accommodation

In 2001, the fragile balance of the Supreme Court in regard to private school assistance programs was tested in *Zelman v. Simmons-Harris*.¹⁶⁰ *Zelman* involved a challenge to an Ohio program that provided to parents either tuition voucher credit, up to \$2250,¹⁶¹ or reimbursement for tutorial services, up to \$360, to augment their children's education at any school participating in the program.¹⁶² The tuition vouchers were available to parents of students who attended private school, and the tutorial reimbursement was available to parents of children attending public school.¹⁶³ The program was first designed to provide aid to low-income families,¹⁶⁴ then to allow other families within the state to apply for any remaining vouchers.¹⁶⁵ Once a student qualified to receive program benefits, he or she could choose from any of the schools participating in the program. If the student chose a private school, his or her parents would receive a check that they endorse over to the school of their choice.¹⁶⁶ According to the court, "[i]n the 1999-2000 school year, fifty-six schools participated in the program, forty-six (eighty-two percent) of which had a religious affiliation".¹⁶⁷ Of the more than 3700 children enrolled in the program that year, ninety-six percent chose to attend a parochial school.¹⁶⁸ Ohio taxpayers challenged the program, arguing that the program's effects impermissibly advanced religion.¹⁶⁹

158. *Id.* at 869 (Souter, J., dissenting).

159. *Id.* at 877 (Souter, J., dissenting).

160. 536 U.S. 639 (2002).

161. *Id.* at 646.

162. *Id.* at 697 (Souter, J., dissenting).

163. *Id.* at 646.

164. *Id.*

165. *Id.*

166. *Zelman*, 536 U.S. at 646.

167. *Id.* at 647.

168. *Id.*

169. *Id.* at 648.

In a 5-4 decision,¹⁷⁰ the court held the Ohio program to be constitutional under the Establishment Clause,¹⁷¹ because it offered a true private choice to its recipients.¹⁷² Relying primarily on the decisions in *Mueller*, *Witters*, and *Zobrest*, the Court stated “[t]hree times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.”¹⁷³ Interestingly, the majority, though mentioning the relevance of neutrality, did not suggest that neutrality could sustain the program on its own.¹⁷⁴ Instead, the Court focused primarily on describing the characteristics of a true private choice program and explaining why such programs are constitutional.¹⁷⁵

Although she represented the fifth vote of the majority opinion, Justice O'Connor also wrote a concurring opinion in *Zelman*, which detailed her reasoning for finding that the Ohio program offers its recipients a true private choice.¹⁷⁶ She argued that parents had many choices of schools available to them, some of which participated in the tuition/voucher program and some of which did not.¹⁷⁷ In fact, the state also expended funds through other programs in support of community and magnet schools, in which any of the parents could have chosen to enroll their children.¹⁷⁸ The additional choices outside the tuition/voucher program were of critical importance to Justice O'Connor, who argued that the number of schooling options available in total, not just as part of the voucher program, should be taken into account when assessing whether parents and students were really able to exercise true choice.¹⁷⁹ Because of the variety of schools available in Ohio, Justice O'Connor found that the program in *Zelman* of-

170. Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, and Kennedy. Justices O'Connor and Thomas also wrote concurring opinions. *Id.* at 642.

171. *Id.* at 644.

172. *Zelman*, 536 U.S. at 653.

173. *Id.* at 649.

174. See Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 560 (2002).

175. See *id.*

176. *Zelman*, 536 U.S. at 663-76.

177. *Id.* at 663-64 (O'Connor, J., concurring).

178. *Id.* at 664 (O'Connor, J., concurring).

179. *Id.* (O'Connor, J., concurring).

ferred a true private choice and therefore was consistent with the Establishment Clause.¹⁸⁰ In her concurring opinion, Justice O'Connor apparently returned to the traditional notion of the necessity of an investigation into the actual effects of the program.¹⁸¹ Likely, Justice O'Connor would not agree with a purely facial standard, such as the one proposed by the plurality in *Mitchell*.¹⁸² Thus, Justice O'Connor would uphold a program of true private choice, but only after determining to her satisfaction that the state implementing the program actually offers a true private choice to the participants.¹⁸³

In an opinion written by Justice Souter, the dissenting Justices argued that the majority had completely broken with long-standing Establishment Clause jurisprudence.¹⁸⁴ Justice Souter invoked *Everson*, in which all nine Justices held "no tax in any amount . . . can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach . . . religion."¹⁸⁵ He argued that the Ohio program was at odds with the "no aid" principle in *Everson*,¹⁸⁶ and therefore, cannot be constitutionally permissible, since *Everson* has never been repudiated or reversed.¹⁸⁷ Justice Souter lamented the acceptance of formalism over realism that began with *Mueller*,¹⁸⁸ which has made substantial amounts of state funds available to parochial schools.¹⁸⁹ In conclusion, Justice Souter wrote: "Madison's objection to three pence has simply been lost in the majority's formalism."¹⁹⁰

180. *Id.* at 676 (O'Connor, J., concurring).

181. See discussion *supra* Part II.B-C.

182. See Green, *supra* note 174, at 560.

183. *Zelman*, 536 U.S. at 676 (O'Connor, J., concurring).

184. *Id.* at 687 (Souter, J., dissenting).

185. *Id.* at 687 (Souter, J., dissenting) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).

186. See *Everson*, 330 U.S. at 15.

187. The "no aid" principle derives from the majority opinion in *Everson*, which held that no taxpayer funds, in any form, could permissibly be used to assist teaching or practicing religion. See *id.* at 16.

188. See *Zelman*, 536 U.S. at 693-94 (Souter, J., dissenting). The *Mueller* Court was the first to mention potential differences between programs that disbursed funds directly to religious schools and those which diverted the funds to schools via the parents, thus permitting different treatment based not on the form of the aid, but rather on the substantive effect of the aid. See *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

189. See *Zelman*, 536 U.S. at 697-98 (Souter, J., dissenting).

190. *Id.* at 711 (Souter, J., dissenting). In this quote, Justice Souter referred back to the original intentions of the founding fathers that no government and/or taxpayer funds would be spent on the promotion of religion. See discus-

Where the law may go from this point is uncertain, as the majority in *Zelman* was very narrow.¹⁹¹ However, the pattern up to this point is unmistakable. The Court has moved away from the traditional respect for "the high wall between church and state"¹⁹² and has slowly gravitated towards greater acceptance of public funds in religious schools.¹⁹³

III. IDENTIFICATION OF THE PROBLEM

In recent years, significant social and political pressure has led to the proposal of many education reform programs, including voucher programs, in order to increase the quality of education in our country.¹⁹⁴ To date, several states have successfully implemented voucher programs.¹⁹⁵ Although state-sponsored voucher programs have legitimate purposes, one of the undisputed goals of voucher programs is to assist parents in enrolling their children in private schools, because private schools are generally considered to offer a better quality education than that of public schools.¹⁹⁶ Since many, if not most, private schools are religiously affiliated, the most significant legal objection to these programs derives from the prohibitions of the First Amendment and the Establishment Clause.¹⁹⁷ Over time, the Supreme Court has struggled to find a bright-line standard to distinguish permissible education reform programs from programs that impermissibly advance

sion *supra* Part II.A.

191. See Bernard James, *Education Law Cases*, 24 NAT'L L.J., Aug. 5, 2002, at C7.

192. See *Everson*, 330 U.S. at 17-18.

193. See Eugene Barnosky, *Increased Tolerance of Religious Activity in Public Schools*, N.Y. L.J., July 18, 2002, at 4.

194. See Manion, *supra* note 60, at 317-18.

195. To date Wisconsin, Ohio, Arizona, Florida, Illinois, Maine, and Vermont have passed some form of voucher legislation. See Davidson, *supra* note 28, at 439. Vouchers have been proposed, but rejected either by the legislature or voters in Texas, California, and Michigan. See *id.* at 439-40. In addition, nine other states are currently considering enactment of voucher programs. See James, *supra* note 191.

196. See Manion, *supra* note 60, at 341.

197. Determination of whether government funds may be disbursed to religious schools depends largely on the interpretation given to historical background and intentions of the founding fathers. The strict separationist view does not permit any government spending on religion, while the accommodationist view permits such spending, but only when the spending does not condone endorsement of the religion(s) of the institutions receiving the funds. See *id.* at 318-23.

religion.¹⁹⁸

In searching for that bright line, the Supreme Court has been moving towards upholding educational reform programs, but at the cost of the protections offered by the Establishment Clause.¹⁹⁹ The Court has stated that its decisions are the natural progression taken from previous decisions and that they do not mark a significant break from the past.²⁰⁰ However, that assertion is based on a misapplication of the prior decisions. The cases leading up to *Zelman*²⁰¹ simply do not support the leap taken by the Court in declaring the Ohio school voucher program constitutional.

Zelman marks a critical juncture in the development of Establishment Clause jurisprudence. The tensions between *Mitchell* and *Zelman* and the differences between the conservative and moderate factions of the Court have left the door open for two possible analyses for future private school assistance programs. The Court can either return to the more reasonable and practical methods of analysis used in the past to evaluate the programs, or it may continue its progression towards approval of government funded religious education.

IV. ANALYSIS

Over several decades, the Supreme Court has gradually modified its approach to Establishment Clause jurisprudence.²⁰² Recently, the Court has made several dramatic changes in its analysis,²⁰³ particularly relating to the issue of public assistance to religious schools.²⁰⁴ Although the Court has never overruled the basic traditional principles espoused in *Everson*,²⁰⁵ *Allen*,²⁰⁶ and *Nyquist*,²⁰⁷ the Court has moved away from the traditional, strict separationist view and has now arrived at a more accommodationist view.²⁰⁸

198. See James, *supra* note 191.

199. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Souter, J., dissenting).

200. See *id.* at 668 (O'Connor, J., concurring).

201. See discussion *supra* Part II.B-E.

202. See discussion *supra* Part II.B-E.

203. See discussion *supra* Part II.D-E.

204. See *Zelman*, 536 U.S. at 649.

205. 330 U.S. 1, 15 (1947).

206. 392 U.S. 236, 242-43 (1968).

207. 413 U.S. 756 (1973).

208. See CHEMERINSKY, *supra* note 59, at 977-83.

*Agostini v. Felton*²⁰⁹ set forth the current test for private school assistance programs, a modified two-prong test from the three-prong *Lemon* test.²¹⁰ The first prong questions whether the program has a legitimate state purpose.²¹¹ This prong is almost always satisfied because one can easily argue that the program was designed with the legitimate purpose of improving the quality of education for children.²¹² The second prong, whether the program has the effect of advancing or inhibiting religion,²¹³ is much more difficult to answer. To resolve this question, the Court looks at three main factors: 1) religious indoctrination, 2) reference to religion, and 3) excessive entanglement.²¹⁴ In the two most recent private school assistance cases, the Court has focused its inquiry almost exclusively on the issue of religious indoctrination in its discussion and interpretation of the relevant factors in each case.²¹⁵

The Court in *Zelman* found no religious indoctrination in the Ohio program, despite its finding that the program would inevitably result in the advancement of religion.²¹⁶ The Court based its decision on its classification of the *Zelman* program as one offering true private choice.²¹⁷ As such, any advancement of religion resulted from the parents, not from the state.²¹⁸ The Court summarized factors of the Ohio program that lead to its classification as a true private choice program, which included neutrality with respect to religion, a general undertaking to provide educational opportunities, application to a broad class of recipients without reference to religion, encouragement of adjacent secular schools to participate, and lack of financial incentive for parents that would skew enrollment towards religious schools.²¹⁹ The *Zelman* majority's emphasis on true private choice marks a very different approach from the evenhanded/neutrality-based approach taken

209. 521 U.S. 203 (1997).

210. See discussion *supra* Part II.D.

211. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

212. See *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

213. See *Zelman*, 536 U.S. at 648-49.

214. See *Agostini*, 521 U.S. at 234.

215. See *Zelman*, 536 U.S. at 653; *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

216. *Zelman*, 536 U.S. at 653.

217. *Id.* at 662.

218. *Id.* at 652.

219. *Id.* at 653-54.

just two years before by the plurality in *Mitchell*.²²⁰ This rapid change in emphasis is especially remarkable given that four of the five Justices that constituted the majority in *Zelman* were the same four in the plurality in *Mitchell*.²²¹

The Court's new accommodationist analysis encourages proponents of private school assistance programs.²²² Most likely, proponents of voucher programs are already working on developing programs, similar to the one in *Zelman*, that provide true private choice to a broad class of people without reference to religion.²²³ However, no one can be certain how the Court will treat private school assistance programs, particularly vouchers, in the future.²²⁴ Although the Court achieved a majority opinion upholding the voucher program in *Zelman*, several remaining inconsistencies and obstacles need to be resolved before true private choice can function reliably as the constitutional band-aid for voucher programs.²²⁵

A. Application of Precedent to Voucher Programs

In *Zelman*, the majority relied on the recognition of true private choice in *Mitchell* to support application of true private choice as the determinative factor of analysis in upholding the Ohio voucher program.²²⁶ The *Mitchell* plurality structured its opinion on the analysis of three prior cases: *Mueller*,²²⁷ *Witters*,²²⁸ and *Zobrest*.²²⁹ On the surface, this progression may seem logical, as all of these opinions considered and upheld government programs that resulted in the disbursement of government funds towards religious education.²³⁰ However, certain critical differences between these programs and voucher programs belie the reliance the Court

220. See Green, *supra* note 174, at 560.

221. The four Justices are Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. The fifth vote to create a majority in *Zelman* was Justice O'Connor, who had filed a concurring opinion in *Mitchell*. See Barnosky, *supra* note 193, at 7.

222. See Manion, *supra* note 60.

223. See Davidson, *supra* note 28, at 483-86.

224. See James, *supra* note 191.

225. See Barnosky, *supra* note 193.

226. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-55 (2002).

227. *Mueller v. Allen*, 463 U.S. 388 (1983).

228. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

229. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); see Frey & Hogben, *supra* note 127, at 175-76.

230. See discussion *supra* Part II.D.

placed on the cases as applicable precedent.

A closer inspection of the factors of the programs in *Mueller*, *Witters*, and *Zobrest* that lead to their classification as true private choice programs reveals three fundamental differences from voucher programs.²³¹ First, the programs in *Witters* and *Zobrest* were geared towards a very narrow class of people.²³² In *Witters*, the state provided vocational aid to a blind individual who happened to be a student at a religious school.²³³ In *Zobrest*, the federal government provided a sign-language interpreter for a deaf child.²³⁴ In each of these cases an individual student who qualified for government aid on the basis of a disability received a very specific type of aid that could only benefit that child, not the school the child attended.²³⁵ In the words of Justice O'Connor, "[w]e decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use."²³⁶ Voucher programs, on the other hand, provide funding to a large group of people to offset general education costs, so that children have access to different schools and types of education than are available to them without the voucher.²³⁷

The second significant difference between the *Zelman* voucher program and the *Mueller*, *Witters*, and *Zobrest* programs is that these cases did not involve a direct transfer of funds to religious schools.²³⁸ On the contrary, the programs in *Witters* and *Zobrest* provided assistance, not funding, directly to the disabled children, and the *Mueller* program allowed parents a tax deduction to offset prior personal expenditures on private school tuition.²³⁹ As seen in the *Zelman* program, however, vouchers provide funds directly to religious schools without restriction on whether the funds are spent on sectarian or secular functions.²⁴⁰ Once a participant has qualified

231. See Green, *supra* note 174; Frey & Hogben, *supra* note 127.

232. See *Agostini v. Felton*, 521 U.S. 203, 251 (1997).

233. See *Witters*, 474 U.S. at 483.

234. See *Zobrest*, 509 U.S. at 4.

235. See *id.* at 10-11.

236. *Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring).

237. See Frey & Hogben, *supra* note 127, at 177.

238. See discussion *supra* Part II.D.

239. See discussion *supra* Part II.D.

240. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 726-27 (2002) (Breyer, J., dissenting).

for the voucher program, the parents evaluate their options and select a school in which to enroll their child.²⁴¹ If the chosen school is a private school, the parents sign over a voucher, like a third party check, to the chosen school administration.²⁴² The school then “cashes in” the voucher and directly receives a transfer of funds from the state.²⁴³ No restrictions ensure that once a religious school receives voucher funds, it spends those funds only on secular and/or remedial instruction.²⁴⁴ Religious schools are thus free to use the funds for any purpose they deem necessary, including functions in the schools geared towards religious indoctrination.²⁴⁵ Although precedent shows that any direct transfer of funds from the government to a religious school for the purpose of religious indoctrination is unconstitutional,²⁴⁶ true private choice now appears to be an exception to that rule.²⁴⁷

The third difference is that the programs in *Witters* and *Zobrest* did not create any incentive, financial or otherwise, for students to attend a private religious school instead of a public school.²⁴⁸ The parents and students did not receive any additional benefits or any financial advantage by placing their children in a religious school, as the child received exactly the same assistance regardless of the school he or she attended.²⁴⁹ The voucher program in *Zelman* promoted enrollment at private schools in two ways. First, it allowed parents to send their children to private schools that would not be available to them without the program.²⁵⁰ In fact, the purpose of the *Zelman* program was to enable parents to pull their children out of the Cleveland public schools and enroll

241. *Id.* at 646.

242. *Id.*

243. See U.S. Gen. Accounting Office Report, *Publicly Funded Programs in Cleveland and Milwaukee*, GAO-01-914 (Aug. 31, 2001) [hereinafter GAO Report].

244. See *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

245. See *id.* at 687 (Souter, J., dissenting).

246. According to Justice O'Connor, “[a]lthough ‘our cases have permitted some government funding of secular functions performed by sectarian organizations,’ our decisions ‘provide no precedent for the use of public funds to finance religious activities.’” *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (quoting *Rosenberger v. Rector*, 515 U.S. 819, 847 (1995)).

247. See Frey & Hogben, *supra* note 127, at 175-76.

248. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986).

249. See *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488.

250. See *Zelman*, 536 U.S. at 646-47.

them in private schools, due to the acknowledged deficiencies of the public schools in that school district.²⁵¹ Second, the program provided \$2250 in assistance if the child attends private school, but only \$360 in assistance if the child remains at a public school.²⁵² Not only did those participants who chose private school receive more assistance, the great majority of private schools (eighty-two percent) participating in the program were religiously affiliated.²⁵³ Thus, the program encouraged parents to send their children to religious schools.²⁵⁴

Statistics show that many of the children would not have attended the schools in which they enrolled without the voucher program.²⁵⁵ In 2001, Senator Judd Gregg commissioned the General Accounting Office (GAO) to research the effects of the Ohio program.²⁵⁶ The GAO concluded that "almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools."²⁵⁷ Likely, these children would not receive their religious educations but for the voucher funds allotted to them by the government.

In determining the constitutionality of the program in *Zelman*, the majority found irrelevant the fact that the majority of schools participating in the program were religious.²⁵⁸ Likewise, the *Zelman* Court did not find relevant the fact that almost ninety-seven percent of the recipients attended religious schools.²⁵⁹ Despite statistical evidence that enrollment in secular private school was not a realistic option for the program participants,²⁶⁰ the majority looked at only two characteristics of the program: the choices offered as a part of the program, and any reference to religion in the qualifications for participation, either by the recipients or the participating schools.²⁶¹ This type of formalism over substance, the pre-

251. *Id.* at 644-45.

252. *Id.* at 645-46.

253. *See id.* at 647.

254. Notedly, out of the 3,765 students who participated in the program, 3,637 (ninety-six percent) attended a religious school, which comprised eighty-two percent of the options available. *See id.* at 664.

255. *See* GAO Report, *supra* note 244.

256. *See id.*

257. *Zelman*, 536 U.S. at 704 (Souter, J., dissenting).

258. *Id.* at 656-57.

259. *Id.* at 658.

260. *Id.* at 704-05 (Souter, J., dissenting).

261. *Id.* at 662-63.

ferred method of analysis of four of the current Supreme Court Justices, ignores the practical effects of the program.²⁶²

B. Inconsistent Treatment of the Establishment Clause

The Supreme Court's history of inconsistent treatment of Establishment Clause jurisprudence creates uncertainty regarding the constitutionality of vouchers cases. Between *Everson* and *Zelman* the Court has considered several different tests, theories, and factors in determining the constitutionality of private school assistance programs.²⁶³ Remarkably, two of the Justices of the *Zelman* majority have previously written opinions that directly contradict the holding in *Zelman*.²⁶⁴

The most notable inconsistency in private school assistance cases is the rapid reworking of the constitutional standard in the two years between *Mitchell* and *Zelman*. After *Mitchell*, the Court had seemed to adopt facial neutrality as the new and improved test for Establishment Clause cases,²⁶⁵ but *Zelman* marked a sharp turn from that view. In *Zelman*, the Court discussed facial neutrality as a relevant factor, but gave it only secondary importance.²⁶⁶ The *Zelman* Court focused its attention instead on true private choice.²⁶⁷ This switch in focus was most likely due to the interest in achieving a majority opinion in *Zelman* with true private choice as the standard, as opposed to the plurality achieved in *Mitchell*, relying upon neutrality.²⁶⁸ What is not certain is whether a majority of Justices can agree on how to apply private choice to voucher programs in the future.

In the future, the Court may limit *Zelman* to its facts. Considering that four Justices strongly oppose the majority's new rationale,²⁶⁹ no more than five Justices likely would vote to approve any government program that provides direct aid

262. *Id.* at 688-89 (Souter, J., dissenting).

263. See discussion *supra* Part II.B-E.

264. See Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1043-44 (2002).

265. See *id.* at 1049.

266. See Green, *supra* note 174, at 560.

267. See *id.* at 560-61.

268. See *id.*

269. The four Justices who dissented in both *Mitchell* and *Zelman* were Justices Stevens, Souter, Ginsburg, and Breyer. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

to religious schools. Therefore, the direction of future decisions seems to rest on the shoulders of Justice O'Connor. Justice O'Connor's concurrence in *Mitchell* indicates no interest on her part in applying the new sweeping standards suggested by the plurality in *Mitchell* to her analysis of private school assistance cases.²⁷⁰ In fact, she rejected the breadth of the plurality opinion in *Mitchell* and remarked that the plurality was taking the Court's prior decisions well beyond their intended meaning.²⁷¹ Clearly, neutrality will not be the main basis of analysis in future cases, as many may have thought after *Mitchell*.

C. Future Analysis of Private School Assistance Programs

Uncertainty remains about where the Supreme Court will draw the line when classifying a program as one of true private choice. A critical factor that could be used to invalidate programs as violative of the separation of church and state is statistical evidence that the primary effect of the funds is support for religious schools. However, for the *Zelman* majority, statistical analysis of the program's effects alone was not sufficient to invalidate the program,²⁷² because the program's effects were attributed to the parents, not the government, and thus the program could be classified as a program that offers true private choice.²⁷³ The critical questions then become whether a program offers true private choice, and whether five Justices can agree on one consistent standard to apply. Within the *Zelman* majority, the five Justices took two very different approaches to evaluating the Ohio program and determining if the program offered true private choice. In her concurrence in *Zelman*, Justice O'Connor analyzed the Ohio program and found it to be a program that legitimately offered true choice.²⁷⁴ In her conclusion, Justice O'Connor explained that the Ohio program offered true private choice, based on the options available through the voucher program itself and through the other schools that did not participate in the program but were still

270. *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring).

271. *Id.* at 841 (O'Connor, J., concurring).

272. *See Zelman*, 536 U.S. at 658.

273. *Id.* at 652.

274. *Id.* at 676 (O'Connor, J., concurring).

available to the parents.²⁷⁵ She determined that because parents could easily choose to enroll their children in other schools, such as charter or magnet schools, those options were relevant to the character of the program as well.²⁷⁶ Although the *Zelman* majority opinion also mentioned the relevance of the breadth of options available state-wide, it was not a critical factor to the majority analysis.²⁷⁷ For the four Justices in the *Zelman* majority,²⁷⁸ an in-depth investigation of the scope of the options available is not required once a determination is made that the program is facially neutral.²⁷⁹ If Justice O'Connor's analysis were applied, the current Court likely would not obtain a majority opinion upholding a voucher program unless a variety of secular and sectarian schools were readily available to the participants.²⁸⁰ A majority of the Court²⁸¹ does not interpret the relevant precedents, particularly *Witters* and *Zobrest*, to mean that direct funding to religious schools diverting funds to religious indoctrination is constitutional. It is only by offering true private choice that a program can qualify for the new exception created in *Zelman*.²⁸² However, even the more restrictive analysis required by Justice O'Connor ultimately permits government funds to be disbursed to religious schools for the purpose of teaching religion.²⁸³ The law has now progressed from *Everson's* "no aid" principle, to *Lemon's* framework of analysis for facially neutral programs, to permitting any private school assistance program that offers a sufficient number of secular options.

275. *Id.* at 663-64 (O'Connor, J., concurring).

276. *Id.*

277. *See id.* at 647.

278. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas discussed the concept of facial neutrality in the plurality opinion in *Mitchell* as the key factor in upholding the constitutionality of the federal assistance program. *See Mitchell v. Helms*, 530 U.S. 793, 809-10 (2000).

279. *See Zelman*, 536 U.S. at 658-60.

280. "These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds." *Id.* at 663 (O'Connor, J., concurring).

281. Five Justices disagreed with this portion of the plurality opinion in *Mitchell*: Justice O'Connor in her concurrence and Justice Souter in his dissent, who was joined by Justices Stevens, Ginsburg, and Breyer. *See Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring), 889 (Souter, J., dissenting).

282. *See Zelman*, 536 U.S. at 669 (O'Connor, J., concurring), 703 (Souter, J., dissenting).

283. *See discussion supra* Part IV.D.

V. PROPOSAL FOR THE FUTURE

Quite likely, the constitutionality of vouchers will be a significant issue before the Supreme Court in the coming years. The social pressures to provide a higher quality of education and to make more school choice options available to parents are increasing as news of the failures of our public schools and the poor educational performance of our children become more and more common.²⁸⁴ As of this writing, at least nine states have proposed or implemented state voucher programs,²⁸⁵ and President Bush included a federal voucher program as part of his first major education legislation package.²⁸⁶ When considering these programs, however, we as a society cannot let our social concerns, as legitimate as they may be, divert our attention from the purposes behind the protections of the First Amendment.

In order to serve the needs of educational reform in our country, while preserving the protections intended by the Establishment Clause, the Court should look for guidance to the decisions in *Witters* and *Zobrest*, not as the plurality in *Mitchell* saw them, but as they were intended at the time. These cases set forth a more practical definition of private choice in which the benefits to the institutions selected by the student were minimal, if any. The Court should approve only programs that offer aid to individuals without advancing or indoctrinating religion. Facts and common sense suggest that providing blank check vouchers to thousands of students to choose from a group of schools, the great majority of which are religious, results in indoctrination of religion that would not occur but for the vouchers.²⁸⁷ Therefore, the Court should limit approval of private school assistance programs to those that assist narrow groups of individuals for secular purposes, but avoid advancing or indoctrinating religion because they do not provide any benefit to the schools themselves. The Court needs to move away from any interpretation of the decision in *Zelman* that would support the constitutionality of

284. See Davidson, *supra* note 28, at 437-38.

285. See James, *supra* note 191.

286. See Davidson, *supra* note 28, at 439. However, the House of Representatives defeated this legislation in 2001. See Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1284 (2002).

287. See discussion *supra* Part II.E.

such a program.

VI. CONCLUSION

Beginning with *Everson*²⁸⁸ and ending, for the time being, with *Zelman*,²⁸⁹ the Supreme Court has gone through many changes over the last five decades in regards to Establishment Clause jurisprudence and its application to private school assistance programs. At this point, the future treatment of this issue is uncertain. What is certain, however, is that to be true to the meaning and intent of the First Amendment, private school assistance programs that provide direct aid to religious schools cannot be permitted. The journey the Court has taken from prohibiting three pence of government funds to religious schools²⁹⁰ to permitting millions of dollars spent in one program²⁹¹ has been paved with good intentions, but it must end soon, or the Establishment Clause protections, so important to our founding fathers, will vanish.

288. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

289. *Zelman*, 536 U.S. 639.

290. *Everson*, 330 U.S. 1.

291. *Zelman*, 536 U.S. 639.
